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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1970

70-9

No. ~~552~~

THOMAS C. LYNCH, et al., *Appellants*

vs.

ROBERT O. GILMORE, JR., et al., *Appellees*

On Appeal from the United States District Court for the Northern District of California

BRIEF FOR THE APPELLANTS

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Topical Index

	Page
Opinions Below	1
Jurisdiction	2
Regulations Involved	3
Question Presented	4
Statement of the Case and the Facts	4
Summary of Argument	6
Argument	9
I. This Court has jurisdiction to hear the instant appeal	9
II. The Constitution does not compel prison administrators to furnish inmates with extensive law libraries or alternative legal assistance	15
III. The relief granted by the District Court exceeds the scope of relief permitted by stipulation of the parties	29
IV. The Eleventh Amendment bars the issuance by a federal court of a mandatory injunction against state officers which can be complied with only through legislative appropriation	32
Conclusion	38

Table of Authorities

Cases	Pages
Austin v. Harris, 226 F.Supp. 304 (W.D. Mo. 1964)	19
Barber v. Page, 239 F.Supp. 265 (E.D. Okla. 1965), rev'd on other grounds, 390 U.S. 719 (1968)	18
Bolden v. Pegelow, 218 F.Supp. 152 (E.D. Va. 1963)	18
Coonts v. Wainwright, 282 F.Supp. 893 (N.D. Fla. 1968)	18
Dews v. Henry, 297 F.Supp. 587 (D. Ariz. 1969)	33
Douglas v. California, 372 U.S. 353 (1963)	27, 28, 35

Pages

Ex parte Hull, 312 U.S. 546 (1941) 19

Fitts v. McGhee, 172 U.S. 516 (1899) 32
Ford Motor Co. v. Department of Treasury of Indiana, 323 U.S. 459 (1945) 32, 33, 35, 37

Gilmore v. Lynch, 319 F.Supp. 105 (1970) 5
Gilmore v. Lynch, 400 F.2d 228 (1968) 1, 2, 4
Griffin v. County School Bd. of Prince Edward County, 377 U.S. 218 (1964) 35
Griffin v. Illinois, 351 U.S. 12 (1956) 27, 35

Harrison Constr. Co. v. Ohio Turnpike Comm'n, 272 F.2d 337 (6th Cir. 1959) 33
Hatfield v. Bailleux, 292 F.2d 632 (9th Cir.), cert. denied, 368 U.S. 862 (1961) 17, 18, 19
Hergenreter v. Hayden, 295 F.Supp. 251 (D. Kan. 1968) 33
Hill v. Nelson, 272 F.Supp. 790 (N.D. Cal. 1967) 36
Hooker v. United States District Court, Central District of California, 380 F.2d 5 (9th Cir. 1967) 22

In re Allison, 66 Cal.2d 282, 425 P.2d 193, 57 Cal.Rptr. 593 (1967) 18
In re Harrell, 2 Cal.3d 675, 470 P.2d 640, 87 Cal.Rptr. 504 (1970) 36
In re Schoengarth, 66 Cal.2d 295, 425 P.2d 200, 57 Cal. Rptr. 600 (1967) 18, 19

Johnson v. Avery, 252 F.Supp. 783 (M.D. Tenn. 1966), rev'd on other grounds, 382 F.2d 353 (6th Cir. 1967), judgment of Court of Appeals rev'd on other grounds, 393 U.S. 483 (1969) 18, 19, 24
Johnson v. Muelberger, 340 U.S. 581 (1950) 10

Kirker v. Moore, 308 F.Supp. 615 (S.D. W.Va. 1970) 36
Koon v. Bottolfsen, 60 F.Supp. 316 (D. Idaho 1944) 36, 37

Lee v. Tahash, 352 F.2d 970 (8th Cir. 1965) 19

Mason v. Pelkes, 57 Idaho 10, 59 P.2d 1067 (1936) 10, 11

Peinado v. Adult Authority, 405 F.2d 1185 (9th Cir.), cert. denied, 395 U.S. 968 (1969) 36
Pelkes v. Mason, 299 U.S. 615 (1937) 11
Pennsylvania P.U.C. v. Pennsylvania R. Co., 392 U.S. 281 (1965) 15
People v. Shipman, 62 Cal.2d 226, 397 P.2d 993, 42 Cal. Rptr. 1 (1965) 29

Pages

Phillips v. United States, 312 U.S. 246 (1941) 15

Roberts v. Pepersack, 256 F.Supp. 415 (D. Md. 1966) 18

Schackman v. Arnebergh, 387 U.S. 427 (1967) 11

Shepheard v. Godwin, 280 F.Supp. 869 (E.D. Va. 1968) 33

Sunshine Anthracite Co. v. Adkins, 310 U.S. 381 (1940) 10

Swift & Co. v. Wickham, 382 U.S. 111 (1965) 14

Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939) 10, 11

United States v. U.S. Smelting Co., 339 U.S. 186 (1950) 12

United States ex rel. Mayberry v. Prasse, 225 F.Supp. 752 (E.D. Pa. 1963) 19

United States ex rel. Stuart v. Yeager, 293 F.Supp. 1079 (D. N.J. 1968) 18

United States ex rel. Wakeley v. Pennsylvania, 247 F. Supp. 7 (E.D. Pa. 1965) 18

Westberry v. Fisher, 309 F.Supp. 12 (D. Me. 1970) 34

Williams v. Dandridge, 297 F.Supp. 450 (D. Md. 1968) 33

Wilson v. City of Port Lavaca, 391 U.S. 352 (1968) 15

Texts and Other Authorities

Larsen, A Prisoner Looks at Writ Writing, 56 Cal. L. Rev. 342 (1968) 24

Sokol, Federal Habeas Corpus (2d ed. 1969) 20, 21, 22

Constitution

United States Constitution:

Eleventh Amendment 8, 32, 33, 34, 35, 37, 38

United States Code

28 U.S.C. §1253 ..... 2, 9

28 U.S.C. §1292(b) 2, 4

28 U.S.C. §2281 ..... 2, 9

28 U.S.C. §2284 2

In the Supreme Court
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OCTOBER TERM 1970

No. 582

THOMAS C. LYNCH, et al.,
Appellants,

vs.

ROBERT O. GILMORE, JR., et al.,
Appellees.

On Appeal from the United States District Court for the Northern District of California

BRIEF FOR THE APPELLANTS

OPINIONS BELOW

The opinion of the three-judge United States District Court for the Northern District of California, filed May 28, 1970, is reported at 319 F.Supp. 105, and is also included in the Appendix at 92-106. The prior opinion of the United States Court of Appeals for the Ninth Circuit, dated August 16, 1968, is reported at 400 F.2d 228, and is included in the Appendix at 28-32. The order of this Court denying certiorari to review the judgment of the Court of

Appeals appears at 393 U.S. 1092 (1969). The original order of the District Court denying the motion to convene a three-judge district court is not reported, but is included in the Appendix at 26-27.

JURISDICTION

This appeal is from an order granting an injunction, entered by a three-judge district court convened pursuant to Title 28, United States Code, sections 2281 and 2284. Assuming the jurisdiction of the court below to act as a statutory three-judge district court, the jurisdiction of this Court to review the decision of the District Court by direct appeal is conferred by Title 28, United States Code, section 1253.

The jurisdiction of the court below to act as a statutory three-judge district court was established in the following manner: a single judge of the United States District Court for the Northern District of California filed an amended order, dated July 6, 1967, denying plaintiffs' motion to convene a three-judge district court, and certifying the existence of a controlling question of law (App. 26-27). Pursuant to Title 28, United States Code, section 1292(b), a special appeal was taken to the Court of Appeals for the Ninth Circuit, the sole issue being whether one or more issues raised by the complaint were required to be heard and determined by a court of three judges. In an opinion filed August 16, 1968, the Court of Appeals answered that question in the affirmative, reversing the order of the District Court. *Gilmore v. Lynch,* 400 F.2d 228 (1968); App. 28-32. Defendants below (appellants

herein) filed a petition for a writ of certiorari, which was denied, 393 U.S. 1092 (1969).

REGULATIONS INVOLVED

California Department of Corrections Administrative Manual Paragraphs 330.041 and 330.042 provide:

330.041

There shall be established in each institution a standard set of basic codes and references which shall consist of and be limited to:

1. The California Penal Code
2. The California Welfare and Institutions Code
3. The California Health and Safety Code
4. The California Vechicle Code
5. The United States and California Constitutions
6. A recognized law dictionary (such as Black's)
7. Witkin's California Criminal Procedures (Bender Moss Co.)
8. Subscription to California Weekly Digest
9. California Rules of Court
10. Rules of the United States Court of Appeals (Ninth Circuit)
11. Rules of United States Supreme Court

330.042

Sufficient copies will be maintained to provide reasonable access on not less than a weekly basis.

(App. 41, 93, 94 n.2).

QUESTION PRESENTED

Does a state have an affirmative federal constitutional duty to furnish prison inmates with extensive law libraries or, alternatively, to provide inmates with professional or quasi-professional legal assistance?

STATEMENT OF THE CASE AND THE FACTS

On October 27, 1966, plaintiffs, indigent California state prisoners, filed a complaint in the court below (App. 2). Counsel was appointed to represent plaintiffs on January 1, 1967 (App. 3), and on April 3, 1967, counsel filed an amended complaint, attacking the constitutionality of the regulations involved in the instant appeal, and making allegations not related to the instant appeal and seeking relief on the basis of such allegations (App. 5, 11-23). The complaint requested that a three-judge district court be convened (App. 18). On July 6, 1967, a United States District Judge filed an amended order denying plaintiffs' motion for the convening of a three-judge district court. The order certified the existence of a controlling question of law (App. 26-27).

Pursuant to Title 28, United States Code, section 1292(b), an appeal was taken to the Court of Appeals for the Ninth Circuit from the order denying the motion. That court reversed the order of the District Court, and remanded for further proceedings looking toward the convening of a three-judge court. *Gilmore v. Lynch*, 400 F.2d 228 (1968) (App. 28-32). Defendants (appellants herein) filed a petition for writ of

certiorari, contending solely that the Court of Appeal erred in holding that a three-judge district court was required. The petition was unanimously denied by this Court. 393 U.S. 1092 (1969).

Following remand, a three-judge district court was duly convened, and on February 9, 1970, the parties filed a document entitled "Stipulation of Settled Statement of Issues," with appendices. This document set forth the stipulated issues, and the stipulated relief to be granted or denied, depending upon the three-judge court's resolution of each issue (App. 33-40). The appendices to this stipulation contained the prison regulations and other materials relevant to a determination of these issues (App. 41-91).

After oral argument, the three-judge District Court entered its order granting relief. The court held unconstitutional the regulations involved, enjoined their enforcement, and ordered defendants to prepare and submit for court approval new regulations either greatly expanding the content of prison law libraries, or providing inmates with the assistance of lawyers or law students in the preparation of their legal papers, or both. *Gilmore v. Lynch,* 319 F.Supp. 105 (1970); App. 92-106. Notice of appeal by defendants was filed June 25, 1970. On August 14, 1970, the district court entered an order staying that portion of its order requiring defendants to file new or amended regulations (App. 107).

The Jurisdictional Statement was filed August 22, 1970. Both parties thereafter, at the request of the Court, filed memoranda on the jurisdiction of the

three-judge district court. Review was granted on February 22, 1971, by the following order:

> "The motion of the appellees for leave to proceed in forma pauperis is granted. Further consideration of the question of jurisdiction in this case is postponed to the hearing of the case on the merits." 39 U.S.L.W. 3359.

SUMMARY OF ARGUMENT

This Court has jurisdiction to hear the instant appeal. Given the jurisdiction of the District Court to act in the capacity of a statutory three-judge district court, this Court's jurisdiction to hear the instant appeal follows as a matter of course. The jurisdiction of the District Court is clearly established by the prior history of this case. The Court of Appeals for the Ninth Circuit held that a three-judge district court was required for litigation of the issues now presented to this Court on appeal. Defendants sought certiorari to review the judgment of the Court of Appeals, but the petition was denied. The determination that a three-judge court was required thus constitutes a final judgment, which is res judicata upon the issue of the three-judge court's jurisdiction. This Court should not extend the inquiry as to its own jurisdiction to the point of opening up the fully and finally adjudicated question of the jurisdiction of the court below. At the very least, the determination of the Court of Appeals that a three-judge court was required is law of the case and this Court, having declined to review that determination, should now fol-

low it. To do otherwise would produce unjustifiable delay, prejudicial to both parties, in the resolution of a lawsuit already long delayed.

On the merits, the District Court was wrong in concluding that the Constitution obliges the states to furnish the inmates of its prisons with extensive law libraries or, in the alternative, a corps of lawyers or law students to assist the prisoners in the preparation of their legal pleadings. The decision of the District Court is in clear conflict with every other state and federal court decision which has considered the question. Prison inmates are ill-equipped by education or intelligence to utilize law books, the arcane tools of the lawyer's trade. Even for those few inmates who may be able to understand law books, their use provides only marginal value, if any. The types of legal documents prepared by prisoners—habeas corpus petitions and Civil Rights Act complaints—demand only a simple statement of facts. Legal citations are unnecessary and, in the hands of the unskilled, may constitute a positive impediment to the consideration of factual claims. The impracticability of supplying massive infusions of legal talent to draft such documents for prisoners is patent. There are simply not enough available lawyers or willing law students. An initial claim for relief, consisting of a simple factual statement, may be stated as readily by an inmate or jailhouse lawyer as by an attorney or law student. When such a claim has been presented to the courts, an attorney will be appointed where needed to advance the prisoner's claims.

The District Court also erred when it granted relief in excess of that which the parties stipulated may be granted. This stipulated relief was the maintenance of the status quo—the nondestruction of existing law books in prison libraries, and the injunction against enforcement of a rule providing for a standardized and exclusive list of law books for each prison library. By ordering the defendants to provide greatly expanded law libraries or professional legal services, the District Court acted in contravention of the stipulation of the parties, and its action is to that extent void.

Finally, the relief granted by the District Court violates the Eleventh Amendment. This amendment, forbidding suits against a state, has been interpreted to bar suits which seek satisfaction of money judgments out of state treasuries, and, more specifically, any relief which can only be afforded by requiring disbursements from state treasuries or requiring legislative appropriations. The mandatory injunction granted by the District Court requires the submission of rules and regulations which can be implemented only through legislative appropriation. To this extent, the order of the District Court violates the Eleventh Amendment and must be reversed.

ARGUMENT

I

THIS COURT HAS JURISDICTION TO HEAR THE INSTANT APPEAL.

Given the jurisdiction of the court below to act as a statutory three-judge court pursuant to Title 28, United States Code, section 2281, the jurisdiction of this Court to hear an appeal from an injunction issued by that court is clear beyond question. Title 28, United States Code, section 1253. Therefore, if there is any question as to the jurisdiction of this Court to hear the instant appeal, the question must relate to the jurisdiction of the court below to act as a statutory three-judge District Court. Our position is that the question of the jurisdiction of the District Court has been settled, and may not be reopened on this appeal, even for the purpose of determining the jurisdiction of this Court.

The procedural history of this case has been set out in detail, *supra*. However, a recapitulation is here in order. Plaintiffs below (appellees herein) originally filed a motion before a single judge for the convening of a three-judge district court. Defendants below (appellants herein) opposed the motion. The single judge refused to convene a three-judge district court, but certified the question of the necessity for such a court to the Court of Appeals. A special appeal taken to that court resulted in reversal of the order, the Court of Appeals holding that a three-judge district court was required to adjudicate the question of the constitutionality of the prison regulations involved.

Defendants disagreed, and filed a petition for certiorari in this Court, arguing as vigorously as possible that a three-judge district court was not required. This Court denied certiorari, without recorded dissent. Thereafter, the three-judge district court was duly convened and proceeded to adjudicate the case.

Thus, it cannot be denied that the issue of the jurisdiction of the court below to act as a statutory three-judge district court has been determined by a final judgment. As such, the question of the jurisdiction of the court below is res judicata.

It is proper to apply the doctrine of res judicata even to questions of subject-matter jurisdiction. As this Court has held, "One trial of an issue is enough. 'The principles of res judicata apply to questions of jurisdiction as well as to other issues,' as well as to jurisdiction of subject matter as of the parties." *Treinies v. Sunshine Mining Co.*, 308 U.S. 66, 78 (1939) (footnotes omitted). *Accord, Johnson v. Muelberger*, 340 U.S. 581, 585 (1950); *Sunshine Anthracite Co. v. Adkins*, 310 U.S. 381, 403 (1940). Nor can it be argued that the doctrine of res judicata is inapplicable when the question adjudicated is purely one of law, involving no issues of fact. For in *Treinies v. Sunshine Mining Co., supra*, the jurisdictional decision to which this Court accorded res judicata effect was purely one of law.[1]

[1]This fact does not appear clearly from the face of this Court's opinion, but is abundantly clear upon reading a case cited in the opinion. At 308 U.S. 69 and n.3, this court cited the case of *Mason v. Pelkes*, 57 Idaho 10, 59 P.2d 1087 (1936), which was the decision of the Idaho Supreme Court, determining an issue of

In *Schackman v. Arnebergh*, 387 U.S. 427 (1967), this Court settled a troublesome question of law by holding that review of an order denying a motion to convene a three-judge district court may be had, in the first instance, only in the Court of Appeals. The decision was certainly a proper one, in view of the fact that the only alternative tribunal to review such a determination question is this Court itself, which is far too busy to suffer the additional burden of reviewing orders denying motions to convene a three-judge district court. But in conferring that responsibility on the courts of appeals, this Court in effect imposed upon itself the correlative obligation of respecting the judgments of those courts, unless this Court chooses to review those judgments on direct attack, by certiorari. Not only would a refusal to abide by such judgments be at odds with normal rules of appellate procedure, but it would inject an intolerable uncertainty into the law. When a judgment of a court of appeals determining the jurisdiction of a district court has become final, and the parties in the district court have relied thereon, such judg-

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jurisdiction, which this Court held res judicata in *Treinies*. A reading of that opinion shows that the Idaho Supreme Court had held that a decree of the Washington State probate court was void as having been entered without subject-matter jurisdiction. The decision was based on the unrebutted presumption, necessarily required in Idaho courts, that foreign law is the same as that of the State of Idaho. 59 P.2d at 1098-99. This Court denied certiorari. *Pelkes v. Mason*, 299 U.S. 615 (1937). Although the propriety of the Idaho determination of the jurisdiction of the Washington court was certainly doubtful, this Court held: "It is unnecessary to consider whether the Idaho determination after the jurisdiction of the Washington court was properly made. . . . [T]he procedure [by which such determinations are made] is subject to question only on direct appeal." 308 U.S. at 77 n.21.

ment should not be subject to collateral attack, either by the parties or by this Court.

Although no case has been found directly deciding the question of whether the doctrine of res judicata is applicable to the resolution of jurisdictional issues upon which the jurisdiction of this Court itself depends, we see no reason why the principles set out above should not apply. While the jurisdiction of this Court must, of course, clearly appear, it may appear as well by adjudication of issues of law as by adjudication of issues of fact. And there is no conflict between the doctrine of res judicata and the power of this Court to determine its own jurisdiction. There is a final judgment determining the jurisdiction of the three-judge district court. This judgment should, under the doctrine of res judicata, be regarded as binding on this Court for the purpose of determining its jurisdiction to hear the instant appeal. This Court's undoubted power to determine its own jurisdiction should not and may not properly be exercised in such a manner as to reopen finally adjudicated questions of law.

Even if, the foregoing notwithstanding, it could be held that the determination of the Court of Appeals that a three-judge district court was required is properly regarded as law of the case, rather than res judicata, that decision should still be followed. It has been held that the doctrine of law of the case is "only a discretionary rule of practice." *United States v. U.S. Smelting Co.*, 339 U.S. 186, 199 (1950). If this means that this Court has discretion as to

whether or not to respect the ruling of the Court of Appeals, we submit that there is ample reason for this Court to exercise its discretion in favor of accepting the validity of such judgment. To do otherwise would be grossly inequitable. The fact that certiorari to review the judgment of the Court of Appeals was sought and denied does not make the judgment of that court any more or less final. But it does present a formidable equitable consideration to guide this Court in exercising its discretion. Both parties did everything in their power to assure that the question of the necessity for a three-judge district court was correctly and finally determined. Defendants' petition for certiorari represented the exhaustion of remedies to effect this end. If this Court had a question as to the propriety of the judgment of the Court of Appeals, it could have reviewed that judgment on certiorari. Since there were not four justices—indeed, so far as the record shows, there were not any justices—who felt the matter worthy of consideration, we submit that it would be grossly inequitable for this Court now to change its mind, and hold that the Court of Appeals was wrong after all, long after the parties and the court below have relied upon and followed the mandate of the Court of Appeals.

Any ruling at this late date that the three-judge court did not have jurisdiction would further delay a final disposition of an equity action now nearly 5 years old—an action founded upon an allegation that irreparable injury would result from delay in the granting of relief. "The purpose of the three-judge

scheme was in major part to expedite important litigation: It should not be interpreted in such a way that litigation, like the present one, is delayed while the proper composition of the tribunal is litigated." *Swift & Co. v. Wickham,* 382 U.S. 111, 124 (1965). Litigation of the composition of the tribunal to hear this case consumed nearly two years. If the decision produced by that litigation is held now not to have been final, the process of litigation will have consumed perhaps five years. Such an intolerable delay would not only prejudice both parties, but would reflect most unfavorably upon the efficiency of the judicial process.

In our petition for certiorari, we expressed ourselves on the merits of the three-judge issue. We do not choose now to take an antithetical position, even though we have the burden of sustaining jurisdiction on the instant appeal. Whatever this Court may consider, or whatever it may express, on the merits of the question of whether a three-judge court is required to determine the constitutionality of a prison regulation issued by a single individual, no considerations of law or equity could justify dismissal of this appeal on the ground that the issues presented by the amended complaint did not, after all, require resolution by a three-judge district court.

If, despite the foregoing, the Court is not satisfied with its jurisdiction in the instant matter, and dismisses the appeal, defendants request that we be given the benefit of this Court's uniform practice of providing for appellate review in the Court of Ap-

peals of district court orders which this Court has concluded need not have been heard by a three-judge court. A "protective appeal" in the Court of Appeals was not filed because there appeared to be no doubt, in light of the history of this case, of the jurisdiction of the three-judge district court. Where this Court has dismissed appeals from three-judge district courts and the appellant has not filed a protective appeal, it has been the uniform practice to vacate the order of the district court in order to allow the entry of a fresh decree which may be appealed to the appropriate court of appeals. *See, e.g., Wilson v. City of Port Lavaca,* 391 U.S. 352 (1968); *Pennsylvania P.U.C. v. Pennsylvania R. Co.,* 392 U.S. 281 (1965); *Phillips v. United States,* 312 U.S. 246, 254 (1941). If that policy is followed herein, we request that the order vacating the opinion of the district court be sufficiently broad to allow that court to reconsider its decision on the merits in the light of this Court's determination as to its jurisdiction.

II

THE CONSTITUTION DOES NOT COMPEL PRISON ADMINISTRATORS TO FURNISH INMATES WITH EXTENSIVE LAW LIBRARIES OR ALTERNATIVE LEGAL ASSISTANCE.

In an effort to standardize the law libraries of each of the 13 major correctional institutions of California, the Director of Corrections of California adopted a regulation providing for a standardized, exclusive set of law books for each institution library. This list

included the four California codes defining penal offenses, the United States and California Constitutions, a law dictionary, *California Criminal Procedure* by B. E. Witkin, the California Weekly Digest, and the court rules of California, the Court of Appeals for the Ninth Circuit, and this Court. The rule provided that sufficient copies will be maintained to provide reasonable access on not less than a weekly basis (App. 41). These regulations, if fully implemented,[2] would have resulted in the augmentation of the law libraries of most institutions, and the removal of some law books from libraries of two major institutions. In a suit to enjoin removal of existing law books and the proscription of augmentation of existing libraries to include books not on the standardized list, the District Court held that the law books provided by the state were constitutionally insufficient to meet the needs of prisoners, and ordered the defendant state officers to file proposed regulations greatly augmenting[3] the prison law libraries or, alternatively, providing for a system of assistance to inmates by lawyers or law students in the preparation of their legal pleadings.

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[2]Pending disposition of this litigation, no law books have been destroyed or removed from any California correctional facility.

[3]The District Court did not state what library augmentations it would find constitutionally necessary, but it pointedly noted that "There are no annotated codes, no United States Reports, no federal reports, no California Reports . . . no copy of any part of the United States Code . . . no edition of the Rules of the Federal District Courts which receive a great many of the habeas corpus petitions, and all of the civil rights petitions filed by California prisoners . . . no other law books or journals, such as 'U.S. Law Week', on the list" (App. 99).

The decision of the District Court is plainly inconsistent with every other state and federal decision which has considered the question of the existence of an obligation on the part of a state to furnish the inmates of its prisons with law books. Each of these decisions has found no constitutional obligation of this sort whatever.

The leading case, which the District Court elected not to follow even though it is a decision of the Circuit in which the court below sits, is *Hatfield v. Bailleaux*, 292 F.2d 632 (9th Cir.), *cert. denied*, 368 U.S. 862 (1961), in which it was held:

> "State authorities have no obligation under the federal constitution to provide library facilities and an opportunity for their use to enable an inmate to search for legal loopholes in the judgment and sentence under which he is held, or to perform services which only a lawyer is trained to perform. All inmates are presumed to be confined under valid judgments and sentences. If an inmate believes he has a meritorious reason for attacking his, he must be given an opportunity to do so. But he has no due process right to spend his prison time or utilize prison facilities in an effort to discover a ground for overturning a presumptively valid judgment.
>
> "Inmates have the constitutional right to waive counsel and act as their own lawyers, but this does not mean that a non-lawyer must be given the opportunity to acquire a legal education. One question which an inmate must decide in determining if he should represent himself is whether in view of his own competency and general prison regulations he can do so adequately. He must

> make the decision in the light of the circumstances existing. The state has no duty to alter the circumstances to conform with this decision." *Id.* at 640-41.

The District Court stated that the above language from *Hatfield* was dictum. We submit that it plainly was holding. The opinion reflects that the prison law library there under consideration was far less adequate than that involved in the instant appeal. *Id.* at 639. Although the question of the obligation of the state to furnish additional law books was not directly in issue, the plaintiffs not having even asserted the existence of such an obligation, the Ninth Circuit nonetheless unqualifiedly reversed an order enjoining prison officials from preventing inmates from purchasing their own law books.

The other decisions in accord are *United States ex rel. Stuart v. Yeager*, 293 F.Supp. 1079 (D.N.J. 1968); *Coonts v. Wainwright*, 282 F.Supp. 893 (N.D. Fla. 1968); *Roberts v. Pepersack*, 256 F.Supp. 415, 433-34 (D. Md. 1966); *Johnson v. Avery*, 252 F.Supp. 783, 787 (M.D. Tenn. 1966), *rev'd on other grounds*, 382 F.2d 353 (6th Cir., 1967), *judgment of the Court of Appeals rev'd on other grounds*, 393 U.S. 483 (1969); *United States ex rel. Wakeley v. Pennsylvania*, 247 F.Supp. 7 (E.D. Pa. 1965); *Barber v. Page*, 239 F. Supp. 265 (E.D. Okla. 1965), *rev'd on other grounds*, 390 U.S. 719 (1968); *Bolden v. Pegelow*, 218 F.Supp. 152, 154 (E.D. Va. 1963) (dealing with inmates of a federal institution); *In re Allison*, 66 Cal.2d 282, 290, 425 P.2d 193, 57 Cal.Rptr. 593 (1967); *In re Schoen-*

garth, 66 Cal.2d 295, 305, 425 P.2d 200, 57 Cal.Rptr. 600 (1967). *See also Lee v. Tahash,* 352 F.2d 970, 973-74 (8th Cir. 1965); *Austin v. Harris,* 226 F.Supp. 304, 307 (W.D. Mo. 1964). *Cf. United States ex rel. Mayberry v. Prasse,* 225 F.Supp. 752 (E.D. Pa. 1963).

The thrust of the opinion of the District Court is that furnishing prison inmates with extensive law libraries is necessary to preserve their right of "access to the courts," which has been defined as:

> "[T]he opportunity to prepare, serve and file whatever pleadings or other documents are necessary or appropriate in order to commence or prosecute court proceedings affecting one's personal liberty, or to assert and sustain a defense therein, and to send and receive communications to and from judges, courts and lawyers concerning such matters." *Hatfield v. Bailleaux, supra,* 290 F.2d at 637.

Historically, "access to the courts" has placed on prison officials only the passive, negative duty of noninterference, such as noninterference with communications between inmates and courts, as in *Ex parte Hull,* 312 U.S. 546 (1941), or noninterference with inmates in their efforts to provide one another with legal assistance, as in *Johnson v. Avery,* 393 U.S. 483 (1969). We argued below that the constitutional duty of prison officials in affording access to the court was limited largely to leaving inmates unhampered in their efforts to communicate with courts, judges, and attorneys, and to secure assistance in the prosecution of their legal actions. The District Court disagreed,

stating that "'Access to the courts', then, is a larger concept than that put forward by the State." (App. 100). But in redefining the concept of "access to the courts," the District Court enlarged it to the point of producing elephantiasis.

Heretofore, the extent of an affirmative constitutional duty on the part of prison officials toward their charges has been to provide them with food, clothing, shelter, and medical care—in other words, the necessities of life. In finding that the Constitution commands defendant state prison officials to furnish inmates with vast law libraries, the District Court has equated the luxuries of litigation with the necessities of life. Before a state can be directed to expend substantial sums of money to furnish prisoners with law libraries, it must clearly appear that the absence of such law libraries denies inmates a fundamental constitutional right applicable to prisoners. The rights found by the District Court to have been abridged are access to the courts and equal protection of the laws. But in fact, neither right is violated by the absence of large prison law libraries.

Failure on the part of prison law officials to furnish prisoners with extensive law book collections can abridge the right of access to the courts, if at all, only if law books are necessary to insure that prisoner claims are fully considered by the courts. But they are not. A petition for writ of habeas corpus, or a complaint filed under the Civil Rights Act, need and should merely set forth a brief statement of the facts upon which the pleader's claim is based. *Sokol, Fed-*

eral Habeas Corpus, 92-94 (2d ed. 1969). Legal citations and arguments are no proper part of a petition for habeas corpus. Moreover, extensive citations by those untrained in the law may, and commonly do, obscure essential factual contentions to the point where a colorably meritorious claim may go undetected. The idea of habeas corpus petitions is simply to get the facts before the court and allow the court to apply the law.

> "Habeas corpus petitions, as the majority notes, are relatively easy to prepare; they need only set out the facts giving rise to a claim for relief and the judge will apply the law, appointing a lawyer for the prisoner and giving him a hearing when appropriate." *Johnson v. Avery, supra,* 393 U.S. at 500 (dissenting opinion of Mr. Justice White, joined by Mr. Justice Black).

But the District Court feels differently, taking "notice that more than simple 'facts' are needed in order to file an adequate petition for relief by way of habeas corpus. A prisoner should know the rules concerning venue, jurisdiction, exhaustion of remedies, and proper parties respondent." (App. 100). As an abstract proposition this is true. But it has little or no application to the situation of the California prisoner. The record in the instant case includes a copy of the habeas corpus forms for federal and state courts which are available free of charge to all California state prisoners. These forms consist of detailed questionnaires designed to elicit from the petitioner the basic facts needed to determine the merits of his claim, including the question of whether he has

exhausted state remedies. So comprehensive are these forms that district courts in the Ninth Circuit have discretion to refuse to consider supplementary legal memoranda appended to the forms. *Hooker v. United States District Court, Central District of California,* 380 F.2d 5 (9th Cir. 1967). While the forms do not expressly instruct the petitioner as to the District in which he should file his petition, or that the warden or superintendent of the institutiton in which he is confined should technically be named as respondent, it has been our experience (and one not challenged by the District Court) that prisoners have little difficulty ascertaining these facts.

At any rate, the possibility that the law books provided inmates under the regulation in question may not fully apprise them of the rules of jurisdiction, venue, and proper parties respondent does not justify the ordering of massive augmentation of prison law libraries. No more than three inexpensive volumes[4] added to the list in question would provide all of the procedural information a prisoner could possibly desire. Yet the court below has not indicated that it would accept such a simple augmentation of the law library list. Instead, the opinion appears to order that appellants must provide numerous complete sets of case reports, which have little or no value in apprising inmates of the "rules concerning venue, juris-

[4] *E.g.*, a volume containing the Judicial Code, the Federal Rules of Civil Procedure, and the Federal Rules of Appellate Procedure; a volume containing the court rules of the federal district courts in California; and SOKOL, FEDERAL HABEAS CORPUS (2d ed. 1969).

diction, exhaustion of remedies and proper parties respondent."

At one point, the District Court seems to say that prisoners must, in preparing habeas corpus pleadings, cite legal authorities, because lawyers do so:

> "When the Return is filed, it is never without abundant citations to legal authority, and a proper traverse must take cognizance of these points. No attorney filing a habeas petition omits a statement of points and authorities, and neither does the State's attorney in responding to one." (App. 100).

This observation misses the point. The convict filing a habeas corpus petition cannot be, and is not, expected to discuss, or even to understand, the law. The habeas petition, in its early stages, should not be tested in the crucible of an adversary proceeding. Its function should be solely to bring to the attention of the courts the factual claims upon which the convict bases his contention that he is being illegally treated. The attorney for the respondent may, and commonly does, point out authorities tending to show that a given petition does not state grounds for relief. His role in this regard is primarily to assist the court. If the judge concludes that an adversary determination of questions of law or fact is necessary for proper adjudication of the inmate's claim, he will appoint an attorney for him. Nor is it really accurate to state that "a proper traverse must take cognizance of these points [*i.e.*, legal citations]." The function of a traverse is simply to deny the factual allegations

of the return and reaffirm those of the petition. Legal authorities are no more a necessary or proper part of a traverse than of a petition.

The remaining proposition relied on in support of the district court's ruling is that the habeas petitioner "should know *which* facts are legally significant, and merit presentation to the Court, and which are irrelevant or confusing." (App. 100). True enough, but the conclusion that hundreds of volumes of case books are going to tell a prisoner which facts of his case to put in a habeas petition is a non sequitur. Case reports are written for lawyers, not laymen. Only the most sophisticated layman can make effective use of these books. And such sophisticated laymen are in short supply in any prison.

> "Jails and penitentiaries include among their inmates a high percentage of persons who are totally or functionally illiterate, whose educational attainments are slight, and whose intelligence is limited." *Johnson v. Avery, supra,* 393 U.S. at 487.

A particular highly literate prisoner, while appearing on the one hand to call for more law books, admits that precious few inmates have the educational background to use them properly. Larsen, *A Prisoner Looks At Writ Writing,* 56 CALIF. L. REV., 342, 352 (1968). If any books will be of material aid to a prisoner honestly wishing to find out if the facts of his case render his custody invalid or colorably so, they are such books as are found on the law library list here under review—*e.g.,* Witkin's valuable work on

California criminal procedure, and the California Weekly Digest, which presents digests of significant decisions of the California courts and this Court. Material digested and synthesized into understandable form would be far more valuable than the raw stuff of case reports. Expecting a high-school dropout to master the complexities of a fifty-foot shelf of case reports would be no more realistic than expecting him to perform a cholecystectomy. He may do a competent job, but the odds are against it.

If there is no constitutional duty on the part of the states to give their prisoners vast law libraries, there is no alternative duty to provide them with legal counsel to draft their habeas petitions. Since a prisoner need only state facts, and not make legal arguments, and since he has access to "jailhouse lawyers" to assist him, he has no constitutional right to post-appellate assistance of counsel at state expense. This is not to say that a prisoner would find the services of counsel wholly without advantage; we say simply that the assistance of counsel is not a necessary part of the concept of access to the courts, since a prisoner can get his claims heard, in the first instance, without such assistance. The availability of appointed counsel when a facially meritorious petition is filed fully protects convicts' rights to their day in court.

And for much the same reasons, refusal of a state to undertake the enormous expense of providing prisoners with huge law libraries or professional assistance does not deny indigent prisoners the equal protection of the law. The only rationale for the equal

protection argument advanced by appellees is that indigent prisoners without extensive law libraries or the services of counsel are invidiously discriminated against vis-a-vis the "affluent convict," who can hire an attorney to prosecute his post-conviction proceedings. But all the indigent defendant need do to secure the appointment of counsel to represent him is to present to a court a simple factual statement showing that he has a colorably meritorious claim to relief. This he can do without law books and without lawyers. A lawyer can doubtless state the facts with more clarity than the average prisoner, but given the courts' uniform liberality in reading prisoner-prepared pleadings, a lawyer's greater skill and draftsmanship will seldom if ever make a difference between an inmate's being granted or denied a hearing. However skillful counsel may be, he cannot supply, if it is otherwise lacking, the one thing which will give the convict relief—the existence of the state of facts showing that he is entitled to relief.

It has never been held that convicts are entitled to the assistance of counsel, as a matter of right, in preparing their initial pleadings in habeas corpus or Civil Rights Act cases. Even the District Court did not find such a right to counsel, except as an alternative to the augmentation of prison law libraries. Since we have demonstrated the absence of a constitutional right to expanded law libraries, it follows that there is no alternative right to the assistance of counsel.

At any rate, the determination of equal protection questions by using as a standard the so-called "afflu-

ent convict" is altogether illusory. Some of this Court's decisions in the area of equal protection for state criminal defendants have not been completely realistic. For example, *Douglas v. California,* 372 U.S. 353 (1963), providing for appointed counsel on appeal, and *Griffin v. Illinois,* 351 U.S. 12 (1956), providing for free transcripts on appeal. We do not attack these decisions, but point out the fragility of some of their foundational bases. For example, in focusing on the "indigent" vis-a-vis the "affluent" defendant, the decisions ignore the great middle range, who have sufficient assets so as not to qualify as indigents, but whose assets are sufficiently limited that the decision as to how to expend them involves a careful and often painful weighing of alternatives. A convicted defendant with $2500 in the bank and little prospect for a successful appeal will normally choose to forego appeal in order to allow the money to be used for the support of his family. As a result of such decisions as *Douglas* and *Griffin,* the poor may have rights often equal to those of the rich, but the rights of both may be greater than those of the bulk of the citizenry.

If the concept of equal protection advanced in *Douglas* and *Griffin* has not proved entirely workable in those situations, it would be far less workable and far more unrealistic should it be extended to the situation at bar. By the time a convict has exhausted the processes of trial and appeal, or foregone the latter, the amount of his assets available for further legal proceedings is likely to be virtually non-

existent. The same exhaustion of the appellate process has greatly strengthened the presumption of validity given to his conviction, rendering prospects for a successful collateral attack exceedingly remote. Only a tiny handful of convicts have available to them unlimited financial resources with which to conduct further legal proceedings. Few if any convicts of moderate means would choose to expend their resources on legal actions holding little if any hope of ultimate success. To hold that the state is constitutionally obliged to furnish all indigent convicts with the legal resources available in fact only to the occasional wife-murdering millionaire, corrupt union leader, or syndicate operative, who cannot escape imprisonment, would be ludicrous indeed. As enormous financial inequality exists among citizens in society at large, so must some financial inequality inhere among citizens in their relations with the state. Only a handful of persons accused of crime are financially able to retain one of the half-dozen ablest criminal attorneys in the country. To hold that the state must provide to all what is otherwise available only to the few is as unworkable and unrealistic a concept of egalitarianism as the pernicious converse that the state must deprive the few of what is not available to all. Neither concept has been accepted in this nation as a matter of political economy, and neither should be as a matter of jurisprudential doctrine.

Rather, lines can be and are drawn, and this Court often sustains them. *Douglas v. California, supra.* California has drawn the line by holding that counsel

will be appointed for an indigent person (whether convict or not) seeking collaterally to attack his conviction if he simply presents to the court a brief factual statement showing he may be entitled to relief. *People v. Shipman*, 62 Cal.2d 226, 397 P.2d 993, 42 Cal.Rptr. 1 (1965). We submit that this rule adequately balances the competing claims of the indigent convicted person against the public dollar and the limited pool of available legal talent.

For the foregoing reasons, the refusal of California to expend its limited financial resources on lavish collections of legal volumes for prison libraries does not deny indigent convicts either reasonable access to the courts or equal protection of the laws. The District Court therefore erred in holding to the contrary, and its order must be reversed.

III

THE RELIEF GRANTED BY THE DISTRICT COURT EXCEEDS THE SCOPE OF RELIEF PERMITTED BY STIPULATION OF THE PARTIES.

In an effort to simplify the matters to be determined by the three-judge court, the parties entered into a stipulation of the issues to be decided and the relief to be granted, depending upon the resolution of each issue. The only issues relevant to the instant appeal were Issues Nos. 1 and 2, which were, in essence, whether the regulations involved in the instant appeal denied indigent inmates either reasonable access to the courts or equal protection of the

laws. The stipulated relief to be granted if these issues were decided in the affirmative was as follows:

> "If the Court decides the question embodying Issue No. 1, in the affirmative, then the provisions of Department of Corrections' Transmittal Letter 26/66, having to do with access of State prisoners, confined in California penal institutions, to law books and other materials utilized in preparation of legal petitions, arguments and pleadings, shall be declared to be an unconstitutional infringement on prisoner access to the courts, in so far as the said Transmittal Letter affects indigent state prisoners, and the defendants, and each of them, shall be enjoined and restrained from enforcing such provisions of the said Transmittal Letter; the defendants, and each of them, shall be further enjoined and restrained from prohibiting inmates of California penal institutions from possessing law books or legal opinions, or other materials utilized in preparation of legal petitions, arguments, and pleadings, except in so far as the defendants, or any of them, may regulate inmate possession of books in general because of space limitations or fire hazard; and shall be further enjoined and restrained from establishing exclusive, standardized lists of law books for all prison law libraries, and from destroying or removing from prison law libraries any existing law books, except as such books become useless because of excessive wear or mutilation." (App. 36).

Essentially identical relief was to be granted on a resolution of the second issue in the affirmative. (App. 37).

The actual relief given by the court was not merely a declaration of unconstitutionality of the regulations involved, and an injunction against their enforcement, which were embraced in the stipulated relief, but in addition, an order mandating the defendants either to augment substantially the existing prison law libraries or provide the assistance of counsel or law students for prisoners desiring it. This kind of relief was clearly outside the scope of the stipulated relief, and went far beyond even the relief prayed for by plaintiffs, who did not suggest that the District Court even had the power to give the relief actually ordered.

By entering into the stipulation, defendants gave up their right to a hearing and determination on their noticed motions to dismiss or for summary judgment, and the right to present evidence refuting the factual conclusions which ultimately formed the basis for the decision of the District Court. Defendants gave up these rights in reliance on the proposition that any relief granted would not exceed that embraced within the terms of the stipulation. Defendants did not even have an opportunity to argue against the relief ultimately granted by the District Court, being deprived of notice that such relief might be granted. Under the circumstances, the stipulation should have been binding on the District Court, at least in the absence of notice that the District Court intended to disregard it, and the failure of the District Court to recognize the stipulation was inequitable.

Nor is it significant that the stipulation stated that certain relief may be granted "if it please the Court . . . ." (App. 35). This language might have given the court below some authority to modify in some particulars the stipulated relief. However, it did not give that court the right, without notice, to disregard the stipulation and grant relief neither contemplated by the stipulation nor prayed for in the amended complaint.

This error of the District Court in refusing to recognize the terms of the stipulation calls for outright reversal of the judgment. At the very least, it demands that the order of the District Court be vacated and the matter remanded for further proceedings.

IV

THE ELEVENTH AMENDMENT BARS THE ISSUANCE BY A FEDERAL COURT OF A MANDATORY INJUNCTION AGAINST STATE OFFICERS WHICH CAN BE COMPLIED WITH ONLY THROUGH LEGISLATIVE APPROPRIATION.

The Eleventh Amendment "denies to the federal courts authority to entertain a suit brought by private parties against a state without its consent." *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 464 (1945). In determining the applicability of the Eleventh Amendment, the question is not whether a state is a nominal party to the action, but whether it is the real party in interest. *Ibid.; Fitts v. McGhee*, 172 U.S. 516, 528 (1899).

While the Eleventh Amendment does not immunize state officers against damage actions directed against them personally, or bar the issuance of negative injunctive relief against them, it does bar the the granting of relief which has the effect of raiding the state treasury. *Ford Motor Co. v. Department of Treasury of Indiana, supra; Harrison Constr. Co. v. Ohio Turnpike Comm'n,* 272 F.2d 337, 340 (6th Cir. 1959). Thus, courts have held unconstitutional state statutes providing for maximum amounts of state welfare aid to any given family, without regard to the size of the family, and enjoined the enforcement of such statutes, but have held that they are without jurisdiction to order legislative appropriation of funds to provide for the necessary grants. *E.g., Dews v. Henry,* 297 F. Supp. 587 (D. Ariz. 1969); *Williams v. Dandridge,* 297 F.Supp. 450 (D. Md. 1968). Similarly, courts have invalidated, and enjoined the enforcement of, state statutes deducting from state aid to school districts some portion of the funds those school districts receive under the federal program for aid to impacted areas. But the same courts have always declared that they are without jurisdiction to order the Legislature to appropriate funds to reimburse the school districts for past unlawful deductions, on the ground that a decree requiring an appropriation by the Legislature would violate the Eleventh Amendment. *E.g., Hergenreter v. Hayden,* 295 F.Supp. 251, 256 (D. Kan. 1968); *Shepheard v. Godwin,* 280 F.Supp. 869, 876 (E.D. Va. 1968). The rationale is set out in detail in

Westberry v. Fisher, 309 F.Supp. 12, 18-20 (D. Me. 1970).[5]

In the instant case, the District Court has ordered the defendant state officers either to obtain extensive collections of law books for prison libraries or to provide prisoners with professional or quasi-professional legal assistance. Either alternative involves the expenditure of substantial amounts of money. We could not, in good faith, submit proposed regulations unless we could assure the court that those regulations could be fully implemented. None of the defendant state officers have control over finances that would permit the expenditures of such funds. The budget of the California Department of Corrections is legislatively mandated. It is broken down into categories such as salaries, academic education, vocational education, recreation, correctional industries, and the like, with numerous subcategories within each category. The defendants have no power to transfer funds from one or more budgeted categories in order to pay for large law libraries or attorneys. Thus, the only way to implement such regulations as the District Court has ordered us to submit for approval would be to obtain a legislative appropriation. Therefore, the only practical means of enforcing the order of the District Court would be to make the Governor and the legislators of California parties to the instant action and affirma-

[5]In *Westberry*, Judge Gignoux distinguished a number of welfare cases awarding retroactive payments of benefits wrongfully withheld, on the grounds that in all cases but one, the Eleventh Amendment had not been considered, and in that one, the Eleventh Amendment analysis was based on authority which did not support it. 309 F.Supp. at 20 & n.12.

tively direct them to appropriate such funds as may be required—an order flagrantly in violation of the Eleventh Amendment and brutally destructive of the federal-state relationships which the Amendment was adopted in order to preserve.

We are aware, of course, that this Court has empowered a district court to take the extreme step of ordering county supervisors to direct their taxing and spending powers in a certain manner. *Griffin v. County School Bd. of Prince Edward County*, 377 U.S. 218 (1964). However, such an order does not transgress the Eleventh Amendment since the Amendment does not apply to suits against counties. "It has long been established that actions against a county can be maintained in United States courts in order to vindicate federally guaranteed rights." *Id.* at 233.

We do not argue, of course, that this Court cannot, on direct review of state-court judgments, effectively order the disbursement of state funds. For example, in holding that states must provide indigents with appointed counsel and free transcripts on appeal, *Griffin v. Illinois, supra,* and *Douglas v. California, supra,* this Court obliged the states to expend considerable additional sums of money in the administration of the criminal laws. However, this was done on direct review of criminal convictions in state courts. *Cf. Ford Motor Co. v. Department of Treasury of Indiana, supra,* 323 U.S. at 470, indicating that a state-court suit against a state may be reviewed in this Court, even if it would be barred by the Eleventh Amendment had it been prosecuted in the federal courts.

There is no need to decide to what extent, if any, federal courts may oblige states to expend their funds in the exercise of the power of federal courts to fashion broad relief as an alternative to release from custody in habeas corpus cases. The instant case is definitely not a habeas corpus case. It has not been and may not be maintained as one. There has been no exhaustion of state remedies, *See Peinado v. Adult Authority*, 405 F.2d 1185 (9th Cir.), *cert. denied*, 395 U.S. 968 (1969). Furthermore, a class action in habeas corpus generally will not lie. *Hill v. Nelson*, 272 F. Supp. 790, 794 (N.D. Cal. 1967).

In the instant case, we might point out, this Court may well have the opportunity at some future date to review, free of the restrictions of the Eleventh Amendment, a decision as to the constitutional sufficiency of existing prison law libraries. The California Supreme Court, in *In re Harrell*, 2 Cal.3d 675, 695 & n.20, 470 P.2d 640, 87 Cal.Rptr. 504 (1970), has indicated a disposition to rule on this question after termination of the instant federal proceedings. This court would, of course, be free to review that ruling on certiorari to the California Supreme Court.

Our point is that an action in the federal courts under the Civil Rights Act does not permit the granting of relief which, though formally against individual defendants, is actually directed against the state, and requires the expenditure of funds from the state treasury. *See Kirker v. Moore*, 308 F.Supp. 615, 624-25 (S.D.W. Va. 1970); *Koon v. Bottolfsen*, 60 F. Supp. 316 (D. Idaho 1944):

> "This provision of the Constitution [the Eleventh Amendment] cannot be defeated by bringing an action of this kind against defendants who have no personal interest in the subject matter of the suit, when the relief prayed for against them, if granted, would require them to perform certain acts that are obligations of the state to perform. The defendants herein are not the real parties in interest, any judgment rendered would of necessity be directly against the State and its moneys. The Constitutional bar provided by the Eleventh Amendment cannot be indirectly set aside by suing the officers of the State individually where the claim for relief is an alleged breach of the State's contract." *Id.* at 322.

Though we have raised the Eleventh Amendment issue in this Court for the first time, we make no apology for so doing. As previously noted, the parties stipulated to the relief which might be granted by the District Court. That stipulated relief would not have been barred by the Eleventh Amendment. We had no notice that the District Court might grant relief barred by that Amendment, and therefore no opportunity to argue the issue in that court. Furthermore, an Eleventh Amendment issue may timely be raised initially in this Court:

> "The Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power with such compelling force that this Court will consider the issue arising under this Amendment in this case even though urged for the first time in this Court." *Ford Motor Co. v. Department of Treasury of Indiana, supra,* 323 U.S. at 467.

The District Court has decreed in the instant case relief which is as effectively directed against the State of California and its treasury as if the state were the only named party. This mandatory relief is plainly barred by the Eleventh Amendment, and to the extent that it grants this relief, the order of the District Court must be reversed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court has jurisdiction to hear the instant appeal, and that the order of the District Court appealed from should be reversed.

Dated, April 22, 1971.

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